



# State of Washington REPORT OF EXAMINATION FOR WATER RIGHT APPLICATION

PRIORITY DATE  
10/8/1998

WATER RIGHT NUMBER  
S3-30258

MAILING ADDRESS  
Steve and Mary Flerchinger  
560 Knotgrass Road  
Pomeroy, WA 99347-9730

SITE ADDRESS (IF DIFFERENT)

## Quantity Authorized for Diversion

DIVERSION RATE

UNITS

ANNUAL QUANTITY (AF/YR)

DENIED

## Purpose

PURPOSE	DIVERSION RATE		UNITS	ANNUAL QUANTITY (AF/YR)		PERIOD OF USE (mm/dd)
	ADDITIVE	NON-ADDITIVE		ADDITIVE	NON-ADDITIVE	

ADDITIVE	IRRIGATED ACRES		PUBLIC WATER SYSTEM INFORMATION	
	ADDITIVE	NON-ADDITIVE	WATER SYSTEM ID	CONNECTIONS

## Source Location

COUNTY	WATERBODY	TRIBUTARY TO	WATER RESOURCE INVENTORY AREA
Garfield	Unnamed Spring	Pow Wah Kee Creek	35-Middle Snake

  

SOURCE FACILITY/DEVICE	PARCEL	TWP	RNG	SEC	QQ Q	LATITUDE	LONGITUDE
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Datum: NAD83/WGS84

REPORT OF EXAMINATION

### Place of Use

PARCELS (NOT LISTED FOR SERVICE AREAS)

LEGAL DESCRIPTION OF AUTHORIZED PLACE OF USE

NA

### Proposed Works

### Development Schedule

BEGIN PROJECT

NA

COMPLETE PROJECT

NA

PUT WATER TO FULL USE

NA

### Findings of Facts

Upon reviewing the investigator's report, I find all facts, relevant and material to the subject application, have been thoroughly investigated. Furthermore, I concur with the investigator that water is not available from the source in question; that there will be a detriment to the public interest and that a new water right is not required for this project since they have an existing water right claim.

Therefore, I ORDER denial of Application No. G3-30258.

### Your Right To Appeal

You have a right to appeal this Order to the Pollution Control Hearings Board (PCHB) within 30 days of the date of receipt of this Order. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal you must do the following within 30 days of the date of receipt of the Order.

File your appeal and a copy of this Order with the PCHB (see addresses below). Filing means actual receipt by the PCHB during regular business hours.

- Serve a copy of your appeal and this Order on Ecology in paper form - by mail or in person. (See addresses below.) E-mail is not accepted.
- You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

Street Addresses	Mailing Addresses
<b>Department of Ecology</b> Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503	<b>Department of Ecology</b> Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608
<b>Pollution Control Hearings Board</b> 1111 Israel Road SW Ste 301 Tumwater, WA 98501	<b>Pollution Control Hearings Board</b> PO Box 40903 Olympia, WA 98504-0903

Signed at Spokane, Washington, this 9th day of April, 2015.



Keith L. Stoffel, Section Manager

For additional information visit the Environmental Hearings Office Website: <http://www.eho.wa.gov>. To find laws and agency rules visit the Washington State Legislature Website: <http://www1.leg.wa.gov/CodeReviser>.

INVESTIGATOR'S REPORT  
Application for Water Right -- Flerchinger  
Water Right Control Number S3-30258  
Dan Tolleson, Department of Ecology

## BACKGROUND

This report serves as the written findings of fact concerning Water Right Application Number S3-30258.

**Table 1 Summary of Requested Water Right**

<b>Applicant Name:</b>	Steve Flerchinger
<b>Date of Application:</b>	10/8/1998
<b>Place of Use</b>	S½SE¼ of Section 19, T. 10 N., R. 43 E.W.M.; the E½ Section 30, except 30 rods of the SE¼ of said section 30, all in T. 10 N., R. 43 E.W.M.; Also beginning at the NE corner of the NE¼SW¼ of said Section 30, T. 10 N., R. 43 E.W.M., thence south ¼ of a mile the SE corner of the said NE¼ of the SW¼, thence west 16 rods, thence north to a point 14 rods south of the north line of said NE¼SW¼, thence in a northerly direction to the place of beginning.

County	Waterbody	Tributary To	WRIA
Garfield	Unnamed Spring	Pow Wah Kee Creek	35-Middle Snake

Purpose	Rate	Unit	Ac-ft/yr	Begin Season	End Season
Domestic single	0.02	CFS		01/01	12/31

Source Name	Parcel	Twp	Rng	Sec	QQ Q	Latitude	Longitude
Unnamed Spring	20104303010000000	10 N.	43 E.	30	E½	46.3147	117.4715

CFS = Cubic Feet per Second; Ac-ft/yr = Acre-feet per year; Sec. = Section; QQ Q = Quarter-quarter of a section;  
WRIA = Water Resource Inventory Area; E.W.M. = East of the Willamette Meridian; Datum: NAD83/WGS84.

## Legal Requirements for Approval of Appropriation of Water

When an application for appropriation of public waters of the state is made, it is the responsibility of the Department of Ecology, Water Resources Program to determine whether or not the application meets the four tests listed in RCW 90.03.290(3):

1. is water available for appropriation,
2. is the proposed use a beneficial use, and
3. will the appropriation as proposed in the application not impair existing rights,
4. nor be detrimental to the public welfare

### Public Notice

RCW 90.03.280 requires that notice of a water right application be published once a week, for two consecutive weeks, in a newspaper of general circulation in the county or counties where the water is to



be stored, diverted and used. Notice of this application was published in the East Washingtonian on July 23 and 30, 2014. No protest was received regarding this application.

#### *Consultation with the Department of Fish and Wildlife*

The Department must give notice to the Department of Fish and Wildlife of applications to divert, withdraw or store water. A letter was received from WDFW on July 3, 2014 that indicated they do not oppose the project, provided it is only used for in house domestic supply of an existing home. The project is subject to state Hydraulic Code (Chapter 77.55 RCW) and fish screening statutes (RCW 77.57.010, RCW 77.57.040 and RCW 77.57.070). Contact the Department of Fish and Wildlife, at 600 Capitol Way N, Olympia, WA 98501-1091, Attention: Habitat Program or by phone at (360) 902-2534, if you have questions about screening criteria.

#### *State Environmental Policy Act (SEPA)*

A water right application is subject to a SEPA threshold determination (i.e., an evaluation whether there are likely to be significant adverse environmental impacts) if any one of the following conditions are met.

- (a) It is a surface water right application for more than 1 cubic foot per second, unless that project is for agricultural irrigation, in which case the threshold is increased to 50 cubic feet per second, so long as that irrigation project will not receive public subsidies;
- (b) It is a groundwater right application for more than 2,250 gallons per minute;
- (c) It is an application that, in combination with other water right applications for the same project, collectively exceed the amounts above;
- (d) It is a part of a larger proposal that is subject to SEPA for other reasons (e.g., the need to obtain other permits that are not exempt from SEPA);
- (e) It is part of a series of exempt actions that, together, trigger the need to do a threshold determination, as defined under WAC 197-11-305.

Because this application does not meet any of these conditions, it is categorically exempt from SEPA and a threshold determination is not required.

## **INVESTIGATION**

In considering the proposed application, the investigation included, but was not limited to, research and review of: (1) appropriate rules and statutes; (2) other water rights, permits, and claims; (3) USGS topographic maps and aerial photographs; (4) proposed diversion, distribution system, places of use; (5) Middle Snake, WRIA 35, ongoing Watershed Management Plan; (6) State of Washington Irrigation Guide and (7) discussions with Department of Ecology regional program staff.

A field investigation was conducted by Dan Tolleson on November 3, 2014, with Mary Flerchinger. The site is approximately thirteen miles southeasterly of Pomeroy, Washington, near the old town site of Peola. The project is located within the upper reaches of the Pow Wah Kee Creek basin which is a tributary sub-basin of Alpowa Creek. Pow Wah Kee Creek basin is approximately 18 miles in length, with

a few smaller side tributaries. The majority of the basin is open lands in an area with little precipitation for recharge. This watershed supports a seasonal creek within the upper basin, and a perennial creek in the lower basin. Pow Wah Kee Creek intersects Alpowa Creek approximately 2.5 miles above its confluence with the Snake River. Currently, Watershed Planning for WRIA 35 is at Phase 4 implementation, but this process is at a standstill due to limited funding.

The proposed place of use describes approximately 310 acres of land, most of which is currently divided between undeveloped riparian vegetation along the creek and dryland crops. A house and two barns are located on the western edge of the project. Domestic water is used at the house on a limited basis, since the house is not occupied much of the year. The house no longer has an irrigated yard.

The proposed point of diversion is a developed spring. The system consists of a pumpstation to provide water for the house and a gravity feed stock water tank. The system has no flow meter or fish screen.

Policy, POL-1025, allows for the conveying of stockwater away from a stream to protect water quality. Essentially surface water can be diverted from a historically used source into a tank for stockwater. The utilization of a stock tank cannot expand the historical use and must have a minimum impact to the source. This policy allows for the development of stockwater from the existing springs.

#### Other Rights Appurtenant to the Place of Use

A review of Ecology records was conducted for existing water right certificates, permits, and claims within the project and the surrounding area. The search focused primarily on Section 30 within T. 10 N., R. 43 E.W.M. The review of Ecology records show two water right claims and a rejected claim appurtenant to the authorized place of use.

**Water Right Claim 093539**, claims 10 gallons per minute and 2 acre-feet per year for domestic supply and stockwater. The claimed source is a spring located within the NW¼SE¼ of Section 30, T. 10 N, R. 43 E.W.M. The claimed place of use is portions of the E½ of Section 30, T. 10N, R. 43 E.W.M. This claim is the same as the appropriation requested under this application (Water Right Application S3-30258). The claim is currently used to provide stockwater (including water for wildlife) and single domestic supply of residence that is only used part time. The claimed date of first use is 1931. According to the "*Department of Ecology v. Abbot 103 Wn. 2<sup>nd</sup> 686, 694 P. 2d 1071*" water right claims predating the adoption of the water code of 1917 (RCW 90.03) must have been exercised by 1932 or are forfeited. Old structures and improvements in the area indicate the springs were developed about the time the claim indicates. In addition, the field examination in conjunction with aerial photographs indicates the spring has been historically used for domestic supply. It appears that since water was put to use under this claim prior to 1932, and has been used consistently since that time, that it is valid.

**Water Right Claim 093540**, claims five gallons per minute and one acre-foot per year for stockwater and sometimes domestic supply. The claimed source is a spring located within the SE¼SE¼ of Section 30, T. 10 N, R. 43 E.W.M. The claimed place of use is the portion of the E½ of Section 30, T. 10 N, R. 43 E.W.M. This claim is currently used to provide stockwater and water for wildlife. This claim is also used as an alternate source of domestic supply water, when the spring for the Flerchinger house is insufficient,



which only occurs in dry years. The claimed date of first use is 1910, which predated the water code. Old structures and improvements in the area indicate the springs were developed about the time the claim indicates. It appears that since water was put to use under this claim prior to the water code, and has been used consistently since that time, that it is valid.

A claim was filed by Steve and Mary Flerchinger in 1998, which is referenced under receipt number 98-001106. This claim was ultimately rejected, but is very similar to the existing claims filed under 093539 and 093540. This rejected claim does not affect the other water right claims listed above.

*The above referenced claim(s) were filed under the Claims Registration Act, Chapter 90.14 RCW. The intent of this act was to document those uses of surface water in existence prior to the adoption of the State Surface Water Code, Chapter 90.03 RCW, which was adopted in 1917, and those uses of ground water in existence prior to the adoption of the State Ground Water Code, Chapter 90.44 RCW, which was adopted in 1945. Since each code(s) adoption, the only means of acquiring a water right within the state is by filing for, and receiving, a permit from the Department of Ecology or one of its predecessors or by establishing a right under the "domestic exemption" under the ground water code (RCW 90.44.050). The Department of Ecology recognizes that the final determination of the validity and extent associated with a claim registered in accordance with RCW 90.14 ultimately lies with the Superior Court through the general adjudication process provided for by Sections 90.03.110 through 90.03.240 RCW. The Department does, however, recognize that water use may be occurring under these claims.*

### Proposed Use and Basis of Water Demand

The applicant proposes to obtain a water right for the spring that is used as the only source for domestic supply of a single home, with no outside irrigation. No specific annual quantity has been requested but typically one acre-foot, per year, is allotted for single domestic supply. Water use under this system is currently documented under Claim 093539, which appears to be valid. No expansion of the project is proposed under this application. The applicant only submitted this application to make sure that they have adequate water rights. Therefore, there is no demand for water under application S3-30258, since the existing claim is adequate.

### Beneficial Use

The proposed use of water is defined in statute as a beneficial use (RCW 90.54.020(1)). However, this application for a new water right is not needed since existing claims appear to be valid and document sufficient water for the project. Therefore, no beneficial use of water is proposed under this application, since there is no demand.

### Public Interest Considerations

No protests were received against granting this water right permit, in response to the public notice. However, National Marine Fisheries Service and Washington Department of Fish and Wildlife have made the following comments:

On August 19, 2014, Ecology requested National Marine Fisheries Service (NMFS) input on new water appropriations within the Snake River basin. A response was received in a letter dated October 1, 2014. They indicated that there are seven species of fish within the basin that are

considered listed under the Endangered Species Act (ESA). The Snake River and the tributaries have limited flows that affect these ESA listed species. They noted that many of the tributaries to the Snake River have limited quantity and often poor quality spawning and rearing habitat. Currently, NMFS has a draft plan for recovery of this basin and has indicated that new consumptive water uses should be denied, unless they have appropriate mitigation.

A letter was received on July 3, 2014 from Washington Department of Fish and Wildlife (WDFW), specific to this project. They do not oppose the project, provided it is only used for in-house domestic supply of an existing home. Typically, WDFW and Ecology recognize that in situations where no other water source is available, a single domestic supply of home is allowed, even if the basin is closed to other uses. This limitation of use along with conversations with WDFW indicates significant concerns for habitat within this basin. Water Right Claim 093539, which appears to be a valid claim, documents the same use as this application. This essentially means that an alternate source is available and WDFW requirement for recommendation are not met. According to the Mrs. Flerchinger, this application was intended to confirm the existing water uses and does not propose a new appropriation of water. Once Mrs. Flerchinger was aware of the existing water right claims, she indicated that they no longer need this application but wanted a decision documenting this process.

As indicated above there is significant public concern regarding new water uses within this Snake River Basin. NMFS and WDFW have generally indicated that they recommend denial of new consumptive use application within this basin due to habitat concerns. The proposed appropriation is not considered consumptive since water use is currently provided for under a valid appearing water right claim. This means that no new water right is required and if issued would be redundant. A request for a redundant water right essentially is the holding water in reservation for some possible future need. Such reservations of water are not allowed under the code and are speculative in nature. Therefore, issuance of this application is not in the public interest.

### Water Availability

For water to be available for appropriation, it must be both physically and legally available.

#### *Physical availability*

For water to be physically available for appropriation there must be ground or surface water present in quantities and quality and on a sufficiently frequent basis to provide a reasonably reliable source for the requested beneficial use or uses. In addition, the following factors are considered:

- Volume of water represented by senior water rights, including federal or tribal reserved rights or claims;
- Water right claims registered under Chapter 90.14 RCW;
- Ground water uses established in accordance with Chapter 90.44 RCW, including those that are exempt from the requirement to obtain a permit; and
- Potential riparian water rights, including non-diversionary stock water.
- Lack of data indicating water usage can also be a consideration in determining water availability, if the department cannot ascertain the extent to which existing rights are consistently utilized and cannot affirmatively find that water is available for further appropriation.



### Legal availability

To determine whether water is legally available for appropriation, the following factors are considered:

- Regional water management plans – which may specifically close certain water bodies to further appropriation.
- Existing rights – which may already appropriate physically available water.
- Fisheries and other instream uses (e.g., recreation and navigation). Instream needs, including instream and base flows set by regulation. Water is not available for out of stream uses where further reducing the flow level of surface water would be detrimental to existing fishery resources.
- The Department may deny an application for a new appropriation in a drainage where adjudicated rights exceed the average low flow supply, even if the prior rights are not presently being exercised. Water would not become available for appropriation until existing rights are relinquished for non-use by state proceedings.

The proposed source is an unnamed spring that has been used to provide water for domestic supply and stockwater, for over 80 years. This historical use is documented under Water Right Claim 093539. This existing claim appears to use most of the water physically available at the spring site, leaving essentially no water available for a new appropriation. According to the applicant, a spring to the south has been historically utilized in dry years to supplement this source, since water is not always available (see *"Other Water Right Appurtenant to the Place of Use"*).

The proposed diversion is located in the headwaters of Pow Wah Kee Creek, which is a tributary to the lower portion of Alpowa Creek. Alpowa Creek basin in recent years had an administrative restriction or Surface Water Source Limitation (SWSL) that closes the basin to all uses except single domestic supply and stockwater. The Washington Department of Fish and Wildlife (WDFW) have submitted a recommendation specific to this project. They indicated that they do not oppose the project, provided it is only used for in-house domestic supply of an existing home, with the understanding that they have no other access to domestic water. Water Right Claim 093539, which appears to be a valid claim, documents the same use as this application. This essentially means that the proposed source is already claimed under RCW 90.14 and WDFW requirements for approval are not met. The WDFW requirements are intended to protect ESA listed fish species and wildlife habitat.

If this application were approved it would essentially be to confirm an existing water right claim. The validity of a water right claim can only be confirmed by Superior Court and is not under the authority of Ecology.

Water is not physically or legally available from the propose source. This is due to the existing water right claim that utilizes all of the practically divertible water during dryer times of the year. Essentially the claim represents a senior water right, leaving nothing available to appropriate. Issuance of a water right permit under this application would essentially be confirming a water right claim which is not under Ecology's authority. In addition, WDFW recommendations for approval are not met because of the existing water right claim.

### Impairment Considerations

Impairment will not be considered in this report, since water is not available and there is no need for additional water under a new water right.

### Conclusions

Although the type of use proposed under the application is beneficial, there is no need for additional water since the existing water right claims document the necessary water for the project. Water is not available for this project and the proposed appropriation is not in the public interest. Impairment considerations were not conducted for this application since it was determined there is no need for additional water.

**It appears that existing Water Right Claim Nos. 093539 and 093540 represent a valid historical water use. The validity of these claims will not be affected by the denial of Application No. S3-30258.**

### RECOMMENDATIONS

Based on the above investigation and conclusions, I recommend that this request for a water right be **denied**.

*Dan Tall*

Dan Tolleson, Report Writer

*4-9-2015*

Date

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